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MICHAEL RODAK, JR., CLERK

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1978

No. 78-890

ALVIN GERSON LEVITT,
AND JAMES RILEY,

Petitioners,

vs.

UNITED STATES OF AMERICA,

Respondent.

ON PETITION FOR A WRIT
OF CERTIORARI FROM THE UNITED STATES
COURT OF APPEALS FOR THE NINTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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IN THE
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ALVIN GERSON LEVITT,
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vs.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI

TO: THE UNITED STATES SUPREME COURT, OCTOBER TERM, 1978:

The petitioners, Alvin Gerson Levitt and James Riley pray that a Writ of Certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Ninth Circuit filed September 1, 1978 which affirmed the petitioners' convictions of violating Title 18, U.S.C. §1955 (illegal gambling business). This single petition is jointly filed on behalf of each petitioner pursuant to Rules of Supreme Court of the United States, Rule 46.

It is vital that this court hear petitioners' case so that it may establish more precise guidelines for the courts to follow in applying the new rules of Franks v. Delaware, ___ U.S. ___, 57 L.Ed.2d 667 (1978). To wit: the petitioners met all the requirements of Franks to entitle them to an evidentiary hearing on a motion to suppress yet were denied said hearing.

Furthermore, this case presents a clear abuse of the wiretap statute by the government. The government herein attempts to avoid the strict requirements of the wiretap statute with regard to its investigative techniques by merely parroting the language of the statute without a real factual basis to justify a conclusion that other investigative techniques were tried or were too dangerous (18 U.S.C. §§2516, et seq.).

OPINION BELOW

The memorandum opinion of the United States Court of Appeals for the Ninth Circuit appears in Appendix A attached hereto. No opinion was rendered by the United States District Court for the Central District of California.

JURISDICTION

The judgment of the United States Court of Appeals for the Ninth Circuit was entered on September 1, 1978. A timely Petition for

Rehearing En Banc was denied on November 3, 1978. A copy of the Order denying the Petition for Rehearing and Suggestion for Rehearing En Banc is attached hereto as Appendix B. The jurisdiction of this court is invoked under 28 U.S.C. §1254(1).

QUESTIONS PRESENTED

I

Whether petitioners herein made the necessary showing of a material omission in a wiretap application affidavit to entitle them to an evidentiary hearing as required under Franks v. Delaware, ___ U.S. ___, 57 L.Ed.2d 667 (1978).

II

Was there a sufficient showing that normal investigative techniques were tried and failed, or reasonably appeared unlikely to succeed, to uphold the validity of the order for wiretap?

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The following relevant provisions appear in the Appendix as Appendix C:

Title 18, U.S.C. §§2518(1)(c) and (3)(c);
Title 18, U.S.C. §1955.

STATEMENT OF THE CASE

The petitioners herein were charged by indictment with violating 18 U.S.C. §1955 (conducting an illegal gambling business). Three other persons were indicted along with petitioners.

A Motion to Suppress Evidence, based upon the failure of the government in its application to wiretap (pursuant to 18 U.S.C. §2518) was denied as was petitioners' request for an evidentiary hearing thereon.

Counsel for petitioners, at the time of the argument on the Motion to Suppress, made an offer of proof of the court that a material omission in the government's affidavit in support of the wiretap application had been made. Specifically, counsel for Levitt offered to prove to the court that agents of the FBI would testify that they had an informant, one Charles Millikan, who was a back office clerk for defendant Levitt who could have supplied all the vital information required by the government for a successful prosecution without the need for a wiretap. (A back office clerk is one who permanently records the wagers taken from front office clerks and consequently knows all the front offices and clerks, the amounts wagered, the bookmaking agents' identities, bettors' identities, as well as having direct contact with the head of the organization.)

Counsel contended that this testimony would establish that the application for wiretap did not set forth all the facts known to the affiant to enable

the magistrate to make an informed judgment that Normal Investigative Techniques had been tried and failed (as required by 18 U.S.C. §2518). The court refused to hold an evidentiary hearing.

(Subsequent to the denial of the motion for an evidentiary hearing, the United States Supreme Court handed down Franks v. Delaware, ___ U.S. ___, 57 L.Ed.2d 667, which guarantees the right to an evidentiary hearing under such circumstances.)

After denial of the Motion to Suppress, trial proceeded by way of a Stipulation of Facts. The United States put on no evidence other than that contained in the Stipulation. Counsel for Levitt put forward no other defense but did reiterate his belief that the wiretap application was defective and that an evidentiary hearing should have been held.

All defendants were found guilty by the court. Defendant Levitt was sentenced to two years in the custody of the Attorney General on provision that four months be spent in a jail-type institution and that the balance of the sentence would be suspended and defendant would be placed on five years probation. Execution of the sentence was stayed pending appeal and bond was left up to stand. Defendant Riley was placed on three years probation and required to pay a fine.

A timely appeal was taken to the United States Court of Appeals for the Ninth Circuit which affirmed the confictions on September 1, 1978. Because of the subsequent handling down of Franks v. Delaware, supra, a Petition for Rehearing and Suggestion for

Rehearing En Banc was then timely filed. On November 3, 1978 the Ninth Circuit handed down an Order denying petitioners' Request for Rehearing and Rehearing En Banc and this Petition for a Writ of Certiorari now follows.

REASONS FOR GRANTING A WRIT

I

PETITIONERS HEREIN WERE UNREASONABLY AND UNFAIRLY DENIED THE RIGHT TO AN EVIDENTIARY HEARING UPON A MOTION TO SUPPRESS EVIDENCE, AS GUARANTEED BY THE RECENT CASE OF FRANKS V. DELAWARE (1978) ___ U.S. ___, 57 L. Ed. 2d 667, EVEN THOUGH THEY MET THE FRANKS' REQUIREMENT THAT A SUBSTANTIAL PRELIMINARY SHOWING OF A MATERIAL OMISSION OF FACT IN THE AFFIDAVIT MUST BE MADE FIRST.

This court in Franks v. Delaware, supra, recently decided the important issue of whether a defendant has a right to an evidentiary hearing upon a motion to suppress evidence when a showing has been made that a government affidavit may contain a material omission or falsehood. The court resolved the issue (and a conflict in the circuits and states) by holding that there is such

a right where a substantial preliminary showing is made that there is a material falsehood or omission:

> "Where the defendant makes a substantial preliminary showing that a false statement, knowingly and intentionally or with reckless disregard for the truth was included by the officers in [a] warrant affidavit, and if the allegedly false statement is necessary to the finding of probable cause, the Fourth Amendment requires that a hearing be held at defendant's request."

At a hearing on the motion to suppress in Franks, defense counsel orally amended the challenge to include an attack on the veracity of the warrant affidavit; he also specifically requested the right to call as witnesses, a Detective Brooks, a Mr. Lucas and a Mr. Morrison. Counsel asserted that Lucas and Morrison would testify that neither had been personally interviewed by the affiant as alleged, and that although they might have talked to another police officer, any information given by them to that officer was "somewhat different" from what was recited in the affidavit. Franks' counsel charged that the misstatements were included in the affidavit not inadvertently, but in "bad faith." The trial court sustained the state's objection to the defendant's proposed evidence and requested hearing. The Delaware Supreme Court affirmed and the United States Court reversed.

In the instant case, at trial, counsels for petitioners did not have the benefit of Franks

(since it was handed down later) but nonetheless made an oral request similar to counsel's request in Franks, i.e., Levitt's counsel requested permission at the time of the suppression motion to call certain FBI agents who would testify that they had an informant, one Millikan, who was a "back office clerk" for defendant Levitt who knew all the "front" offices and clerks, the amounts wagered, the bookmaking agents' identities, bettors' names and in general could supply all the information necessary for a successful prosecution under §1955, without the need for the wiretap which the government used. (Such evidence, if accepted by the court, would result in suppression of the wiretap's evidence since the wiretap statute only permits wiretapping where "normal investigative techniques" are insufficient. See Reason for Granting a Writ II, infra.

Even though counsel for Levitt made various oral requests for an evidentiary hearing the court refused to hold one. The trial proceeded by way of a Stipulation of Facts and defendants were convicted. An appeal was taken to the Ninth Circuit Court of Appeals, but before Franks was handed down. (See Appendix A for the opinion.) Defendants' convictions were affirmed by the Ninth Circuit but a Petition for Rehearing and Suggestion for Rehearing En Banc was timely made when counsel discovered that Franks had been handed down. The Ninth Circuit refused a Rehearing, without comment.

It is petitioners' contention that the Ninth Circuit acted incorrectly as well as unfairly in denying petitioners' appeal. Petitioners made a

substantial preliminary showing of a material omission in the government's affidavit and an evidentiary hearing was properly requested as per Franks. Petitioners can only speculate that the Ninth Circuit simply did not want to bother reopening a case once it was decided, regardless of any new cases coming down, even if they were directly on point. Petitioners feel that they should not be denied their Fourth Amendment rights simply because they were exercising them in advance of the Supreme Court's definite ruling thereon.

Finally, it is vitally important that this court further clarify and better define exactly those instances where a sufficient showing has been made to entitle a defendant to a Franks' type hearing. The broad standards set out in that case are simply too ill defined to adequately inform the lower courts of when a defendant is en titled to an evidentiary hearing.

II

THERE WAS AN INSUFFICIENT SHOWING THAT NORMAL INVESTIGATIVE TECHNIQUES WERE TRIED AND FAILED OR REASONABLY APPEARED UNLIKELY TO SUCCEED TO UPHOLD THE VALIDITY OF THE ORDER FOR WIRETAP UNDER 18 U.S.C. §§2516, ET SEQ.

While petitioners rely primiarily on the failure of the court to grant the evidentiary hearing as the major ground for this Petition, it is also respectfully

submitted that there was government noncompliance with the statutory requirements of 18 U.S.C. §§2516, 2517 and 2518(1)(c) which resulted in the improper issuance of an order to wiretap.

Although the United States Supreme Court has not given direct consideration to the sufficiency of applications alleging unlikely success of other investigative techniques (see United States v. Chavez, 94 S.Ct. 1849 (1974), footnote 3) the Court has summarized the importance of these requirements in United States v. Giordano, 40 L.Ed.2d 341 (1974):

> "Congress legislated in considerable detail in providing for applications and orders authorizing wiretapping and envinced a clear intent to make doubly sure that the statutory authority be used with restraint and only where circumstances warrant the surreptitious interception of wire and oral communications. These procedures were not to be routinely employed as the initial step in criminal investigation. Rather, the applicant must stat e and the court must find that normal investigative procedures had been tried and failed or reasonably appear to be unlikely to succeed if tried or to be too dangerous. (Citation omitted.)"

The Act has been upheld against constitutional attack only because courts serve to maintain precision as to its requirements and to closely scrutinize wiretap orders to ensure that the issuing magistrate not serve merely as a

"rubber stamp" for the police. (United States v. Kalustian, supra, 529 F.2d at 589; United States v. Bobo, 477 F.2d 974 (4th Cir. 1973); United States v. Cox, 449 F.2d 679 (10th Cir. 1971), cert. den. 406 U.S. 934 (1972); United States v. Cox, 462 F.2d 1293 (8th Cir. 1972).)

In People v. Kerrigan, 514 F.2d 35 (1975 9th Cir.), also involving a prosecution under 18 U.S.C. §1955, the Court found in Kerrigan an affidavit of a wiretap to be marginally sufficient in satisfying the normal investigative techniques requirements of 2518(1)(c) but, more significantly, the court warned against the use of boilerplate recitations:

> "We agree with appellants that boilerplate recitations of the difficulty of gathering usable evidence in bookmaking prosecutions is not sufficient basis for granting a wiretap order. To hold otherwise would be to make §2518(1)(c) and (3)(c) mere formalities in bookmaking cases."

It is clear therefore that a supportive affidavit must demonstrate by specific factual evidence why traditional investigative techniques are not sufficient to the particular case at hand. United States v. Kalustian (1976), 529 F.2d 585 (disapproving an affidavit); United States v. Spagnuolo, 549 F.2d 705, 710 (9th Cir. 1977).

The application in the instant case should have been quashed because the affidavit on its face contained less than the showing that normal

investigative techniques had been tried and failed than the disapproved affidavit in Kalustian, supra. Also, the instant affidavit contains far less of a showing than the "original" affidavit which was approved in Kerrigan or that set forth in Spagnuolo.

The instant affidavit is long in length, but it contains the boilerplate, conclusionary statements and lack of particularization disapproved of in the aforementioned cases.

Because of the clear Congressional dictate that the wiretap statute only be used where normal investigative techniques have been tried or failed, it is imperative that this court review the instant case so that it may review the abusive use of this statute that has occurred. This Honorable Court should establish further guidelines in regards to wiretap affidavits and §§2516, et seq., so as to adequately safeguard the Congressional mandate.

CONCLUSION

This Petition presents the important question of the scope of the right to an evidentiary hearing as guaranteed in Franks v. Delaware, supra, and also presents the question of government compliance with the wiretap statute's requirement that normal investigative techniques be used or reasonably appear to be unlikely to succeed, before a wiretap application can be granted. Both questions are of

major, national import in the criminal field and require this court's consideration.

Respectfully submitted,

ARTHUR LEWIS
Attorney for ALVIN LEVITT

MORTON BOREN
Attorney for JAMES RILEY

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

FILED
Sep 1 1978
Emil E. Melfi, Jr.
Clerk, U.S. Court of Appeals

UNITED STATES OF AMERICA,	)	
	)	No. 77-3470
Appellee,	)	78-1082
	)	
v.	)	MEMORANDUM
	)	
ALVIN GERSON LEVITT and	)	
JAMES JOSEPH RILEY,	)	
	)	
Appellants.	)	
	)	

Appeal from the United States District Court for the Central District of California

BEFORE: WALLACE and SNEED, Circuit Judges and ENRIGHT, District Judge*

Appellants challenge their convictions for illegal gambling activities under Title 18 U.S.C. Section 1955. Four issues are raised regarding: 1) the sufficiency of the Government's application for authorization to intercept wire communications; 2) the necessity of holding an evidentiary

*Honorable William B. Enright, United States District Judge for the Southern District of California, sitting by designation.

hearing on the motion to suppress; 3) the sufficiency of the evidence as to Appellant Riley; and 4) the constitutionality of Sections 1955 and 2518 of Title 18 of the United States Code. We affirm.

SUFFICIENCY OF GOVERNMENT APPLICATION FOR WIRETAPS

Title 18 U.S.C. Section 2518(1)(c) requires that a Government application for a wiretap order contain:

> "a full and complete statement as to whether or not other investigative procedures have been tried and failed or why they reasonably appear to be unlikely to succeed if tried or to be too dangerous."

Upon examination of the affidavit submitted by the Government in support of the application for a wiretap order, we find that the Government provided an adequate factual basis upon which the court could determine that normal investigative techniques, employed for a reasonable length of time, were unsuccessful. Specifically, the affidavit stated that physical surveillance conducted during the six months prior to the issuance of the wiretap had proved fruitless, that the Government's informants refused to testify even if given immunity, that search warrants employed in the past had been ineffective to gain sufficient evidence to prosecute Levitt, that telephone toll records had proved ineffective to gain substantial evidence because the subjects did not make many long distance calls, and

that undercover infiltration would not be likely to succeed because Levitt only employed persons whom he knew personally or were recommended by friends. The Government fulfilled the statutory requirements establishing the necessity for the wiretaps.

DENIAL OF EVIDENTIARY HEARING

Appellants contend that the district court erred in not granting their request for an evidentiary hearing on the sufficiency of the Government's application for the wiretap order.

The movant has the burden of demonstrating that some allegation in the Government's affidavit is false before he is entitled to a hearing for the purpose of impeaching the affidavit. United States v. Scott, 555 F.2d 522 (5th Cir. 1977). Where the defendant challenged an affidavit supporting a search warrant, the court stated:

> "Evidentiary hearings need not be set as a matter of course, but if the moving papers are sufficiently definite, specific, detailed, and non-conjectural to enable a court to conclude that contested issues of fact going to the validity of the search are in question, an evidentiary hearing is required." United States v. Ledesma, 499 F.2d 36, 39 (9th Cir. 1974), cert. denied, 419 U.S. 1024 (1974).

An evidentiary hearing is not required unless the movant makes a prima facie showing that the affidavit includes a substantial falsehood or omission. United States v. Harris, 501 F.2d 1, 5-6 (9th Cir. 1974). Appellants did not make the showing required in Harris; accordingly the district court's denial of their request for an evidentiary hearing was not in error.

SUFFICIENCY OF THE EVIDENCE AS TO APPELLANT RILEY

Appellant Riley maintains that there was insufficient evidence linking him to his co-defendants' gambling operation. The evidence against Riley included, inter alia: 1) intercepted telephone conversations in which Riley received "pay and collect" figures for at least twelve different persons; 2) an incriminating statement taken at the time of Riley's arrest; 3) betting paraphernalia taken from another suspect; and 4) expert testimony on gambling operations. Viewing the evidence in the light most favorable to the Government, we find that there was ample evidence in the record to support Riley's conviction. Glasser v. United States, 315 U.S. 60 (1942).

CONSTITUTIONALITY OF 18 U.S.C. §1955 AND 18 U.S.C. §2518

We disagree with Appellants' contention that 18 U.S.C. §1955 and §2518 are unconstitutional. See, United States v. Feldman, 535 F.2d 1175 (9th Cir. 1975), cert. denied, 429 U.S. 940 (1976).

AFFIRMED.

APPENDIX B

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

FILED
Nov 3 1978
Emil E. Melfi, Jr.
Clerk, U.S. Court of Appeals

UNITED STATES OF AMERICA, Plaintiff-Appellee, vs. ALVIN GERSON LEVITT and JAMES JOSEPH RILEY, Defendants-Appellants.	)	Nos. 77-3470 78-1082
	)	ORDER

Before: WALLACE and SNEED, Circuit Judges, and ENRIGHT,* District Judge

The panel as constituted above has voted to deny the petition for rehearing and to reject the suggestion for rehearing en banc.

The full court has been advised of the suggestion for rehearing en banc and no judge of the court has requested a vote on the suggestion for rehearing en banc. Fed. R. App. P. 35(b).

The petition for rehearing is denied and the suggestion for rehearing en banc is rejected.

*Honorable William B. Enright, United States District Judge, Southern District of California, sitting by designation.

APPENDIX C

TITLE 18 U.S.C.

§ 1955. Prohibition of illegal gambling businesses

(a) Whoever conducts, finances, manages, supervises, directs, or owns all or part of an illegal gambling business shall be fined not more than $20,000 or imprisoned not more than five years, or both.

(b) As used in this section—

(1) "illegal gambling business" means a gambling business which—

(i) is a violation of the law of a State or political subdivision in which it is conducted;

(ii) involves five or more persons who conduct, finance, manage, supervise, direct, or own all or part of such business; and

(iii) has been or remains in substantially continuous operation for a period in excess of thirty days or has a gross revenue of $2,000 in any single day.

(2) "gambling" includes but is not limited to pool-selling, bookmaking, maintaining slot machines, roulette wheels or dice tables, and conducting lotteries, policy, bolita or numbers games, or selling chances therein.

(3) "State" means any State of the United States, the District of Columbia, the Commonwealth of Puerto Rico, and any territory or possession of the United States.

(c) If five or more persons conduct, finance, manage, supervise, direct, or own all or part of a gambling business and such business operates for two or more successive days, then, for the purpose of obtaining warrants for arrests, interceptions, and other searches and seizures, probable cause that the business receives gross revenue in excess of $2,000 in any single day shall be deemed to have been established.

(d) Any property, including money, used in violation of the provisions of this section may be seized and forfeited to the United States. All provisions of law relating to the seizure, summary, and judicial forfeiture procedures, and condemnation of vessels, vehicles, merchandise, and baggage for violation of the customs laws; the disposition of such vessels, vehicles, merchandise, and baggage or the proceeds from such sale; the remission or mitigation of such forfeitures; and the compromise of claims and the award of compensation to informers in respect of such forfeitures shall apply to seizures and forfeitures incurred or alleged to have been incurred under the provisions of this section, insofar as applicable and not inconsistent with such provisions. Such duties as are imposed upon the collector of customs or any other person in respect to the seizure and forfeiture of vessels, vehicles, merchandise, and baggage under the customs laws shall be performed with respect to seizures and forfeitures of property used or intended for use in violation of this section by such officers, agents, or other persons as may be designated for that purpose by the Attorney General.

(e) This section shall not apply to any bingo game, lottery, or similar game of chance conducted by an organization exempt from tax under paragraph (3) of subsection (c) of section 501 of the Internal Revenue Code of 1954, as amended, if no part of the gross receipts derived from such activity inures to the benefit of any private shareholder, member, or employee of such organization except as compensation for actual expenses incurred by him in the conduct of such activity.

Added Pub.L. 91-452, Title VIII, § 803(a), Oct. 15, 1970, 84 Stat. 937.

§ 2518. Procedure for interception of wire or oral communications

(1) Each application for an order authorizing or approving the interception of a wire or oral communication shall be made in writing upon oath or affirmation to a judge of competent jurisdiction and shall state the applicant's authority to make such application. Each application shall include the following information:

* * *

(c) a full and complete statement as to whether or not other investigative procedures have been tried and failed or why they reasonably appear to be unlikely to succeed if tried or to be too dangerous;

* * *

(3) Upon such application the judge may enter an ex parte order, as requested or as modified, authorizing or approving interception of wire or oral communications within the territorial jurisdiction of the court in which the judge is sitting, if the judge determines on the basis of the facts submitted by the applicant that—

* * *

(c) normal investigative procedures have been tried and have failed or reasonably appear to be unlikely to succeed if tried or to be too dangerous;

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UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The per curiam opinion of the court of appeals (Pet. App. A) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on September 1, 1978. A petition for rehearing was denied on November 3, 1978 (Pet. App. B). The petition for a writ of certiorari was filed on Monday, December 4, 1978. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether petitioners were entitled to an evidentiary hearing to determine whether an application for an order authorizing electronic surveillance of their telephone conversations contained a significant omission concerning

the likelihood of success of alternative investigative techniques.

2. Whether statements contained in the application concerning the availability of alternative investigative techniques were sufficiently detailed to comply with statutory requirements.

STATEMENT

Following a jury-waived trial in the United States District Court for the Central District of California, petitioners and two co-defendants were convicted of conducting an illegal gambling business, in violation of 18 U.S.C. 1955. Petitioner Levitt was sentenced to two years' imprisonment, 20 months of the sentence were suspended and he was placed on probation for five years. Petitioner Riley was sentenced to three years' probation and to pay a $250 fine (Tr. 177-178, 187). The court of appeals affirmed (Pet. App. A).

1. Briefly, the evidence showed that from May until early September of 1975, petitioner Levitt managed a bookmaking operation in the Los Angeles, California, area that employed petitioner Riley and others as agents (Tr. 93-104). In the normal course of business, wagers from bettors were received by telephone at the operation's "front office" and were transmitted to its "back office," where the wagers were recorded and the results of wagering were computed. Those results would be relayed ...ck to the front office, where agents such as petitioner Riley would contact bettors for the purpose of making payments to or collections from them as the result of their wagers (Tr. 104-105). Telephone conversations made in the course of these activities established that on many days during the period in question the operation grossed in excess of $2,000 per day in wagers (Tr. 106-112).

During the investigation of this bookmaking operation, FBI agents applied to a United States District Judge for

authorization to monitor the telephones known to be utilized by the participants (R. 21-28).[1] An affidavit supporting the application stated, *inter alia,* that physical surveillance conducted during the preceding six months had proved fruitless, that government informants had refused to testify even if granted immunity, that searches of petitioner Levitt's records had been unproductive, that telephone toll records were also unproductive as an evidentiary source, and that the enlistment of bettors as informants was unlikely to be productive because lower echelon employees would insulate the bettors from Levitt (Pet. App. A-2 to A-3; R. 48-57). Following issuance of the surveillance order, investigative agents intercepted conversations of both petitioners (R. 103, 113, 126).

2. At trial, petitioners moved to suppress the contents of the intercepted conversations. In connection with the motion, petitioner Levitt sought to present the testimony of several FBI agents to demonstrate that the surveillance application contained a material omission concerning the availability of alternative investigative procedures and, hence, did not comply with Title III of the Omnibus Crime Control and Safe Streets Act of 1968.[2] Levitt claimed the agents would testify that, in addition to the four confidential informants mentioned in the affidavit supporting the surveillance application, the government was also obtaining information from Charles Millikan, a back office clerk in the operation. The omission of this

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[1] "R." refers to the clerk's transcript, a copy of which is being lodged with the Clerk of this Court.

[2] 18 U.S.C. 2518 provides in pertinent part:

> (1) Each application for an order authorizing or approving the interception of a wire or oral communication shall be made in writing upon oath or affirmation to a judge of competent jurisdiction and shall state the applicant's authority to make such application. Each application shall include the following information:

information from the affidavit, Levitt urged, undermined the basis of the authorizing judge's determination that normal investigative techniques were likely to be fruitless. The trial judge refused to entertain the proffered testimony and denied the suppression motion (Tr. 66-70). Transcriptions of the intercepted calls were subsequently admitted into evidence (Tr. 115-117, GX 2).

ARGUMENT

1. Relying on *Franks* v. *Delaware*, No. 77-5176 (June 26, 1978), petitioners contend (Pet. 4, 6-9) that their allegation of a material omission in the affidavit entitled them to an evidentiary hearing on the sufficiency of the government's application for the surveillance order. *Franks*, however, does not support their claim. In *Franks*, this Court required that an evidentiary hearing be held if "the defendant makes a substantial preliminary showing that a false statement knowingly and intentionally, or with reckless disregard for the truth, was included by the affiant in the warrant affidavit, and if the allegedly false statement is necessary to the finding of probable cause" (slip op. 1).

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* * * * *

(c) a full and complete statement as to whether or not other investigative procedures have been tried and failed or why they reasonably appear to be unlikely to succeed if tried or to be too dangerous;

* * * * *

(3) Upon such application the judge may enter an ex parte order, as requested or as modified, authorizing or approving interception of wire or oral communications within the territorial jurisdiction of the court in which the judge is sitting, if the judge determines on the basis of the facts submitted by the applicant that—

* * * * *

(c) normal investigative procedures have been tried and have failed or reasonably appear to be unlikely to succeed if tried or to be too dangerous * * *.

Petitioners have met neither of these requirements.[3] First, they have failed to present any facts suggesting that the alleged omission was the result of deliberate falsehood or reckless disregard for the truth. Although they allege "a material omission" (Pet. 6), the Court emphasized in *Franks* (slip op. 17) that, even when a misstatement is material, "[a]llegations of negligence or innocent mistake are insufficient" to require a hearing. Second, they have not demonstrated that the omission involved was truly material, since they have not shown that the disclosure of Millikan as a source of information would have led the district judge to refuse to issue the intercept order on the ground that alternative investigatory techniques were sufficient. See *United States* v. *Santarpio*, 560 F. 2d 448, 453 n.4 (1st Cir. 1977).

As the trial judge properly observed (Tr. 66-68), under the federal gambling statute it was essential not only to connect petitioners to the operation, but also to establish that the operation involved five or more persons and that it either remained in continuous operation in excess of 30 days or had a gross revenue of $2,000 in any single day. See 18 U.S.C. 1955(b)(1). While the offer of proof averred the existence of an informant whose involvement was not disclosed in the agent's affidavit,[4] it did not show that information supplied by the informant would have satisfied these crucial evidentiary requirements or that, in contrast to his anonymous counterparts, Millikan would have been willing to testify or would have been granted

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[3]We note further that *Franks* dealt with the constitutional requirement of a showing of probable cause to support a search warrant, while this case involves a statutory requirement unrelated to probable cause.

[4]An affidavit executed by petitioner Levitt accompanied his written motion. It averred, *inter alia*, that "Charles Milligan" (sic) was employed by him, knew the names of other employees, and maintained records for him (R. 13-14).

immunity by the government.[5] Hence, the proffer did not demonstrate that Millikan's availability to supply information about the operation constituted an adequate substitute for electronic surveillance. Consequently, disclosure of his existence would not have affected the issuing judge's determination that alternative investigative techniques were inadequate, particularly since the telephone was the principal vehicle for conducting the ongoing criminal operation. See *United States* v. *Santarpio, supra,* 560 F. 2d at 452.

2. Petitioners also claim (Pet. 9-12) that the surveillance application failed to comply with the requirements of Title III because it did not explain the reasons why traditional techniques were insufficient to investigate the gambling operation. As the court below recognized (Pet. App. A-2 to A-3), the extensive affidavit supporting the surveillance application not only enumerated alternative techniques that had been attempted or considered, but also provided detailed explanations why, in this particular case, such techniques had either failed or probably would prove fruitless. For example, it explained that while some information was available from confidential sources, those sources were afraid to testify even if immunized and given protective custody (R. 48); that surveillance had been attempted but was frustrated by precautions taken by the subjects (R. 49-50); that review of telephone toll records was fruitless since calls made from the suspects' telephones were to toll-free telephone numbers (R. 53-54); that previous search warrants executed on petitioner Levitt's papers did

[5]The affidavit accompanying the surveillance application stated that "[t]he only witnesses who could provide evidence to the grand jury pertaining to the illegal gambling business are the subjects of the investigation themselves and a handful of suspected bettors. In view of the fact that the subjects face criminal prosecution it is not likely that they would voluntarily testify" (R. 57).

not result in seizure of meaningful evidence (R. 54-55); that the use of bettors as informants would be fruitless since such persons would come into contact only with lower echelon employees of the operation (R. 51-52, 55-56); and that Levitt's hiring practices made it virtually impossible for an infiltrator to obtain employment in the operation (R. 52-53). These detailed explanations place this application in marked contrast with that considered in *United States* v. *Kalustian,* 529 F. 2d 585 (9th Cir. 1975), upon which petitioners rely.[6]

[6]In *United States* v. *Spagnuolo,* 549 F. 2d 705, 709-710 (9th Cir. 1977), the court recognized that its circuit's decisions in this area "often lead to results difficult to harmonize," but concluded that the appropriate standard is that "the affidavit, read in its entirety, must give a factual basis sufficient to show that ordinary investigative procedures have failed or will fail in the particular case at hand. * * * An affidavit composed solely of conclusions unsupported by particular facts gives no basis for a determination of compliance with Section 2518(1)(c). *Kalustian* teaches no more than that." The Ninth Circuit standard as promulgated in *Spagnuolo* was clearly met here. In any event, this Court has, since the time of the *Kalustian* decision, declined numerous requests to review decisions alleged to be in conflict with *Kalustian.* See, *e.g., United States* v. *Berlin,* 559 F. 2d 1215 (5th Cir.), cert. denied, 434 U.S. 1012 (1977); *United States* v. *Scully,* 546 F. 2d 255 (9th Cir. 1976), cert. denied, 430 U.S. 970 (1977); *United States* v. *Kirk,* 534 F. 2d 1262 (8th Cir. 1976), cert. denied, 433 U.S. 907 (1977). Nothing has happened recently to justify any change in this Court's refusal to review what is fundamentally an intra-circuit conflict. Cf. *Wisniewski* v. *United States,* 353 U.S. 901 (1957).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1978
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JAMES JOSEPH RILEY,

Petitioners,

vs.

UNITED STATES OF AMERICA.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

PETITIONER'S REPLY TO GOVERNMENT'S BRIEF IN OPPOSITION TO CERTIORARI

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This reply is made to the government's brief in opposition to petitioner's request for a grant of certiorari. The opinion below, jurisdictional statement and statement of issues is found in petitioner's petition for certiorari filed earlier.

The respondent United States alleges (Respondent Brief page 4) that petitioner herein has misplaced reliance on Franks v. Delaware, #77-5176, June 26, 1978 in that petitioner has failed to present facts suggesting that an alleged omission was the result of deliberate falsehood or reckless disregard of the truth; and that petitioner has not demonstrated the omission was truly material since petitioner did not show that disclosure of the informant Millikan as a source would have led the District Judge to refuse to issue the wire communication intercept order.

If the affiant cannot be questioned, respondent is correct in stating petitioner failed to present facts showing deliberate falsehood or reckless disregard of the truth. It would appear however, that once petitioner made an offer of proof of the omission of a material fact, as here, an opportunity to inquire of the affiant would have taken no great amount of trial time. The affiant either knew the informant and the nature of his information or he did not, and the court could determine for itself whether the omission was material, deliberate or otherwise.

All that petitioner states is that he should have been afforded the opportunity to at least question the affiant regarding the matter. This was not a fishing expedition to learn the identity of a secret informant. It was an allegation that a source close to the petitioner who had all the information the government might need to make its case without a wire-tap, was providing said information to the government.

Clearly, both tests of Franks were met.

It is submitted that petitioner's offer of proof and the response of the government thereto at the time of trial reflected that Millikan was an informant for the government and that he was supplying information or evidence that would provide all of the jurisdictional elements. At least petitioner should have been afforded the opportunity to so establish.

It should be pointed out that defendants in this and other wiretap cases have, among other things, urged that the government's numerous applications for wiretap authorization fail to show that normal investigative techniques have been tried and/or why they are not likely to succeed or otherwise establish necessity for the tap.

The government, in its efforts to persuade the court of the "necessity" for the wiretap points to all its "failures" (sometimes in conclusory language, sometimes not) witness Kalustian v. United States (529 F.2d 585 (9th Cir. 1975)); Spagnuolo v. United States (549 F.2d 705, 709-710 (9th Cir. 1977)).

The government often alleges that the informers (who apparently quite frequently in these affidavits have more than enough information to warrant indictment and conviction) refuse to testify even if immunized and given protective custody. This allegation is made with such regularity that it appears to be a boiler plate recitation.

Defendants have no means of determining the truth of these allegations much less the identity of these informants. This allegation (re refusal to

testify) must of necessity go unchallenged since no means to compel proof thereof exists. Since one cannot question the affiant agent on the issue, the likelihood of confirming this fact through the informant evaporates.

Where the factual showing of "necessity" for the tap is marginal, or challenged, the issue of other sources of evidence looms large in what is now a "probable cause" equation.

"Necessity" for a wiretap would appear to be the equivalent of a showing of probable cause for a search warrant, although in addition thereto and statutorily required.

Where as here, the defendant does at least learn the identity of an informant, and in an offer of proof alleges that this source is privy to all the information and evidence required to provide the government with a case against petitioner and his organization, it would appear that he should be afforded the opportunity to make that showing.

If in fact Millikan is an informant for the FBI (which fact appears to be conceded by counsel for the government at trial) then his whereabouts are more peculiarly in the knowledge of the government than the defendant. At the very least, petitioner should have been afforded the opportunity of questioning the affiant concerning the nature of the information received from this source so that conceivably the government's own agents may have supplied information akin to Brady material. This would have also afforded this defendant the unique opportunity of testing the government's alleged

boiler plate recitation that the informants all refused to testify even if immunized because they feared for their safety.

While petitioner's offer of proof at trial appeared to be inartfully drawn, it was made without benefit of this court's opinion in Franks and in the course of argument before a judge and court that, albeit respectfully, injected comment and posed questions that drew counsel away from the full effect of his offer (as a reading of the trial transcript would reflect).

Clearly, from the record, the offer of proof was sufficient to show that the proferred source could not only connect petitioner to the operation, but that his position of "back office" clerk would enable him to establish the number and names of associates (5 or more) and that it remained in continuous operation in excess of 30 days and had a gross revenue in excess of $2,000 in a single day during this period, i.e., the jurisdiction and elements of the crime charged.

CONCLUSION

It is respectfully submitted that for the foregoing reasons the petition for a writ of certiorari should be granted.

Respectfully submitted,

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